

March 8. 1763. 29

A N S W E R S

F O R

*Divorce on the head
of adultery.*

ALEXANDER CUNNYNGHAME, one of the
Clerks to the Signet,

T O

28—

The Bill of ADVOCATION presented in name of
JAMES MALCOLM, Spouse to the said *Alexander Cun-
nynghame.*

WHatever expectations may be conceived, that the respondent, in answering this bill of advocation, should embrace the opportunity thereby offered, of vindicating his character from the many false, injurious and malicious calumnies, industriously propagated without doors, in order to give unfavourable impressions of his conduct to this complainer, his lawful wedded wife, and the mother of his child procreated of said marriage; and however anxious the respondent may be to deliver himself from the weight of this unjust obloquy and reproach; yet, in the present circumstances of things, as the libel of divorce is now pending in the proper court, and matters prepared for an immediate proof of the offences charged in that libel, he is advised, and judges it more expedient, to forbear entering into a detail of particulars, further than is necessary for explaining the answers that he is now humbly to offer to this bill of advocation; leaving it to the witnesses, when brought upon their solemn oaths to give testimony in this cause, to specify the particulars of the complainer's guilt, so far as is consistent with their knowledge; and should think it his greatest happiness, was it possible for the complainer to prove her innocence.

He makes no difficulty to acknowledge, that, from the outward appearance of the many good qualities that he discovered in this
A complainer,

complainer, he conceived a strong affection for her ; and, from these promising appearances, flattered himself with the hope and prospect of much happiness with her in the married state.

From these motives alone he made his addresses to her, and obtained her consent to become his wife ; and the marriage was accordingly celebrated upon the 13th of *February* 1762, when the complainer was within a few months of the 20th year of her age, whereby she had attained full maturity, both of person and judgment.

These flattering hopes of happiness were soon blasted ; and, to his unspeakable misfortune, he found just cause to suspect, that the favourable opinion he had conceived of her was ill founded.

His distress of mind, occasioned by this discovery, is only to be conceived by those who have experienced the like misfortune. Willing to hope that there was a possibility of his being mistaken in the suspicions he had conceived, he took the resolution, out of regard to her happiness, as well as his own, to communicate to her his apprehensions, thereby to put her upon her guard ; that it would be impossible for her to carry on a criminal intercourse, for any length of time, without his discovering it ; that he hoped he would be mistaken ; and that her future conduct would soon convince him it was so.

This most disagreeable subject he mentioned to her with all the gentleness and tender affection that a man could do who wished to be undeceived, and conducted himself towards her with the same complacency and gentleness from the hour he took her by the hand to that in which he parted with her, whatever pains have been taken to create a contrary belief : for the truth of which he does not rely singly upon her own judicial acknowledgment, as hereafter to be stated, but upon the credit and authority of some of her own nearest relations, who lived in family with them several months, and were witnesses of his behaviour to her during that space, and to their parting ; when, in their presence, after he had communicated what measures he was resolved to take for obtaining justice for the supposed wrongs, he desired she would say, Whether, since their marriage, he had behaved to her in private with less good manners, gentleness, and humanity, than he had always done in their presence ? She acknowledged, he always had ; and he is confident, these her relations have done, and will do him justice, in that respect.

Quem Deus vult perdere, prius dementat. The alarm which the respondent



spondent had thus taken, and communicated to her in so gentle a manner, ought at least to have operated so far as to have engaged her, if not totally to abstain, at least to be more prudent and circumspect in the pursuit of these her unlawful pleasures. But he had the mortification to find, she was so infatuated, and so deeply immersed, as to run her course, without any regard to the caution he had given her.

After being thoroughly satisfied of her guilt, it became necessary for the respondent, in duty to himself, and in order to obtain redress for so signal an injury, to endeavour, by all fair and lawful means, to discover such particulars as he might reasonably hope would be sufficient to convict her; and, consequently, to vindicate himself to the world, in suing a divorce from this unfortunate marriage: and he has reason to think, that such discoveries were made, as, in the event of a fair and impartial trial, will be available for both these purposes.

But as, in the mean time, the complainer proved with child, and was so far advanced, that, to have attacked her at that time, might have been deemed an act of real inhumanity to her; and, under the distress of mind which a challenge of this nature would probably occasion, though under sanction of the law, might have been considered as the means of destroying both her and the child, the thoughts of either of which were more dreadful to him than all the distress he could suffer in continuing to live in family with one who had thus abused the confidence he had reposed in her; he resolved to postpone the process of divorce till after her delivery and recovery; when he dismissed her from his family, and put her into the hands of her own relations, in a manner that he flatters himself will be no reproach to his conduct and behaviour towards her.

He was particularly attentive, that the libel of divorce should be formed with as much delicacy of expression as the nature of the case would admit of. And as in all processes of this nature, especially where a continuance and repetition of the same criminal correspondence is charged, a certain latitude in point of time is usual and customary, it was charged in this summons, That the complainer, from the time of her said marriage, which, as already observed, draws back to the 13th of *February* 1762, had carried on this criminal correspondence, and repeatedly committed the crime of adultery, in the several places therein mentioned and described, and, more particularly, in the respondent's houses, both in town and country, with persons, one or more, known to be other persons than the respondent himself.

The complainer compeared in this process, having the assistance, not only of those her own relations to whom she had been delivered over, and in whom she mostly confided, but also of counsel learned in the law. And in the introduction to her signed defences, after professing the highest regard for the respondent, she did, *in terminis*, acknowledge, *That he had always treated her with the greatest humanity and tenderness, notwithstanding his suspicions of her.* — She declined making any defences against the libel in point of form, which might retard the trial, which she was desirous should come on as soon as possible; and therefore, waving all objections to the latitude taken in the libel, both as to time and place, and to the vague expressions of keeping company with men privately in an unseemly and unlawful manner, from which premisses she was pleased to contend the crime of adultery could hardly be inferred, she agreed that the libel should go to proof: but insisted, That, before it went to proof, “ the respondent should condescend specially with
 “ respect to the persons with whom he is to prove her guilty. *2dly*,
 “ That, before any proof is allowed, he shall produce any written
 “ evidence upon which he founds, particularly some declarations which he made her sign. *3dly*, As she was credibly informed, that the pursuer had examined privately upon oath several of the witnesses concerning what they knew of this matter, she submitted it to the court, whether it be not proper that the
 “ pursuer should confess or deny this fact; and if it be true that
 “ he has examined any in this manner, whether he ought not to
 “ condescend upon the persons whom he has so examined?”

To these defences the respondent made answers. Upon advising of which, the Commissaries were pleased to pronounce the following interlocutor, 25th February 1763: “ Before answer, ordain the pursuer to condescend more particularly with respect to the persons
 “ with whom he alledges the defender to have been guilty of the
 “ crime libelled; and also ordain the pursuer to produce in the
 “ clerk’s hands, all writings, and declarations, in his possession,
 “ signed by the defender, relative to this process, or the crime
 “ therein libelled against her; and reserve the consideration of the
 “ other point, touching the examination or precognition of witnesses, till such witnesses are adduced, or a list of them given
 “ in to process.”

Though the respondent was humbly of opinion, from the advice he had received in this matter, and from the uniform practice of the commissary-court, which, by law, has the original and privative

tive jurisdiction, in all processes of this nature, that he was not bound to condescend more particularly upon the persons with whom she was said to have been guilty, or to exhibit any writings or declarations that he was said to have obtained from her, until he should have occasion to produce the same *in modum probationis*, in case he should find it necessary to make use of them, but prejudice to the complainer to call for any particular writing *in modum probationis*, upon which she could found any defence; yet, in order to gratify the complainer in the first particular above mentioned, in as far as he was advised he could safely comply therewith, he preferred a petition to the Commissaries, reclaiming against the aforesaid interlocutor; and therein exhibited such a condescendence of the particular marks of those persons whom he chiefly suspected to be guilty of the acts of adultery libelled, as were sufficient to show, that the persons so described, behoved to be different persons from the pursuer. And more particularly did condescend, "That one of
 " them was a tall black man, wearing his own hair; that another
 " of them was a tall fair man, likewise wearing his own hair; that
 " another of them was a tall black man with a wig;" referring for a more particular description of the guilty persons, to the depositions of the witnesses, when they should be examined; but protesting at the same time, that this condescendence or description should not be understood to import any consent upon his part, that his proof was to be limited to those particular persons, or that the witnesses may not be examined as to all and sundry who may have been guilty, so distinguished, as to make it evident and certain, that those persons were other than the pursuer himself.

And with respect to the second branch of said interlocutor, ordering him to lodge, in the clerk's hands, all writings and declarations in his possession, signed by the defender, relative to said process, or the crime libelled against her, he pleaded, in point of law, That supposing him to be possessed of any such writings; as he was not yet resolved, nor did know whether there would be occasion to found upon these, the complainer had no title to crave exhibition of them, unless she would alledge some relevant defence to be proven by these writings: and that this general exhibition was so much the more improper, and irrelevant, as the complainer could not be ignorant what writings she had so recently granted; and as her judicial acknowledgment of the respondent's having treated her all alongst with the greatest humanity and tenderness, redargued every suspicion of his having used any unlawful means to obtain

any writing from her, which was improper for her to have granted.

Upon advising said petition and condescendence, with answers thereto for the complainer, the Commissaries pronounced this other interlocutor, 2d March 1763. " The Commissaries having considered the petition and condescendence given in by the pursuer, with answers thereto for the defender, and the former proceedings in the cause; particularly the defences to the libel, whereby the defender passes from the generality of the libel, both as to time and place; before answer, allow the pursuer a proof of his libel and condescendence, and the defender a conjunct probation thereanent, and of all facts and circumstances tending to exculpate or elide the libel; and grant diligence *hinc inde*; the pursuer, before extract of this diligence, lodging in the clerk's hands, all writings or declarations signed by the defender, relative to this process, or the crime therein charged against her; the said writings only to be communicated to the defender, or any of her lawyers or doers she shall appoint to inspect or peruse the same; but not to be made any part of the process, unless in so far as either party may found on them, during the course of the process; with certification, that any such writings or declarations not so produced, shall not afterwards be received by the court, or used by the pursuer, as evidence in the cause."

These interlocutors are in part brought under your Lordships review by the bill of advocacy now to be answered. And the particular articles of complaint are these two: 1st, That the libel is admitted to proof, without obliging the respondent to be more special in his condescendence of the particular persons with whom the complainer is said to have been guilty of the crime charged. 2^{dly}, That the Commissaries have superseded the consideration of the other objection, respecting the precognition of the witnesses, till such witnesses are adduced, or a list of them given in to process.

For though it is remarked as a singularity in this libel, that within the period in which she is said to have been guilty of these criminal practices, is comprehended the time she was in childbed; yet no particular conclusion or inference is from thence drawn: and as the complainer did, *in terminis*, wave any objection to the generality of the libel in this particular, the respondent shall only say, that as he did not know by experience, how long that obstacle might stand in the way, and as he wished to go no further into particulars than was absolutely requisite, he judged it unnecessary to make

make any exception upon that account, referring these matters to be explained by the proof.

The respondent, in his turn, will be pardoned to observe, that those professions which the complainer sets out with, of her anxious desire to have this matter brought to a speedy trial, but do ill correspond with the obstructions she now throws in the way; and her unwillingness to submit to the same form of trial to which every other woman, even those of the highest quality in the kingdom, have been subjected in the like cases, does not look as if her chief reliance was on her innocence. If she is conscious of innocence, she has nothing to fear from any proof that can be brought against her, unless she suspects subornation on the respondent's part, and perjury on the part of the witnesses. *Mens conscia recti* will never be alarmed with such groundless and imaginary apprehensions. But what construction can her conduct now admit of, when, after professing such an anxious desire to bring on the trial, she grows so much the more backward as it advances; and, in place of putting her trust in a consciousness of innocence, would screen herself under the shadow of legal quiddities and distinctions; which, at the same time, can procure her no real advantage, as they are not only contrary to the established and uniform proceedings of that court to which the law has given a privative jurisdiction and cognisance of these matters, but to every principle of reason and justice?

In questions of this nature, the law has not only in view the punishment of the guilty, but also the protection of the innocent, and reparation of the injury; which, abstracting from the crime, is the greatest of all injuries that any person can sustain: And therefore it would be most unreasonable, that the party injured in so delicate a point, suing for redress, should be put under such hardships and difficulties, as would exclude all possible means of convicting the offender. This the law could never intend, as it would be giving sanction, if not an impunity, to the commission of this crime.

For it is, with submission, a jest, to pretend, that for want of such special condescendence, she is deprived of the means of proving those persons to be *alibi* with whom she is said to have been guilty. This objection, if in any degree relevant, would rather apply to the time and place, than to the persons. Was she accused only of a single fact, and with a single person, there would be some appearance of relevancy in her offering to prove *alibi* of that person at the time. But she does not advert, that this scene of iniquity is charged to have been continued during the course of several months; and

and that to undertake a proof of *alibi* as to persons for such a space, is undertaking in fact an impossibility : and if her hope of safety only depends upon such a proof, her case is certainly very desperate. If the guilt is proved, it is impossible she can be innocent. It is the testimonies of the witnesses that must ascertain both the persons and times ; and if, after the respondent's proof respecting these matters has been taken, the complainer will undertake to prove, that the persons against whom the guilt is proved were *alibi* at the time, the respondent will make no objection to her being allowed such proof : but in the shape matters stand at present, the libel is relevantly laid ; and the law requires no other description of the person, either in the libel itself, or in the testimonies of the witnesses when they come to depose, than is sufficient to ascertain, that the person with whom the crime was committed was not the husband, but some third party. It is in this that the essence of the crime consists. Whatever other person it was with whom the crime was committed, is immaterial.

Nor is this peculiar to the crime of adultery. If a person is murdered, and thrown into a river, or the body disposed of in such other manner as to render it impossible to prove who the particular person it was that is so murdered, it would be no defence, That the indictment did not specify the particular person, or that he was unknown to the witnesses ; because it is not *de essentialibus* of the crime, who the particular person is that was so murdered, but whether a murder was committed.

So also, in the case of robbery, if a highwayman should be proved to have robbed a stage-coach, supposing it not to be discovered who the persons robbed were, the robbery itself being proved, judgment behoved to pass against the guilty person.

And just so, in the present case, he cannot in law or reason be bound to condescend further, or more specially, than is sufficient to constitute the crime of adultery. If he proves her guilty with any other person than himself, that instructs the crime. How then is it possible that he should be obliged to condescend beyond what he is bound to prove ?

Such special condescendence would in many cases be impracticable. The crime is of such a nature, that it is for ordinary committed in privacy or secret, with a view to conceal it from the husband's knowledge ; so that of all others he has the least access to know the guilty person.

Suppose a husband to be abroad in the *West Indies* for many years,
and

and that, upon his return home, he gets intelligence that his wife had been living in a constant course of adultery with other persons ; but that, upon the strictest inquiry, he can get no intelligence who the guilty persons were, possibly unknown to the witnesses themselves, but absolutely certain that it could not be the husband, because not in the country, or in other respects of such a different form and figure that there could not possibly be a mistake of the one for the other: what for a plea would it in such case be for the wife, in bar of the husband's action for a divorce, That the marriage should not be dissolved, because he could not prove whether it was *John* or *James* with whom she had been guilty?

The annals of this country furnish examples, even in persons of high rank, where the gallant, in order to conceal himself, has gone to the places of assignment, even to the husband's own house, cloathed in the habit and dress of a poor beggar.

The respondent does not mean to deny, that he does suspect, and is in his conscience convinced, that he knows who some of the guilty persons are, though he has not such absolute certainty of being able to prove all their guilt, that he can, with any propriety, condescend upon their names: And it is very possible, that some of the witnesses, when they come to speak to facts, may not be in condition to say, with absolute certainty, who the particular persons were, upon all these different occasions ; though they know well, and are certain, from their distinguishing marks, that it was not the respondent ; which is all that the law can possibly require, even from the witnesses themselves. But to require from the husband, that he should condescend on the names, is, with all due submission, absurd beyond measure ; because it is requiring a condescendence of what the law does not suppose him to know ; and which not being essential to the crime, but at the same time injurious to the party condescended upon, if his particular guilt should not be proved, cannot be required, whatever his suspicions or belief may be.

And to conclude upon this article, he does aver, and say, That upon looking into the records of the commissary-court, where such processes are only to be found, no such special condescendence has been thought necessary ; and the uniform practice has been, not only to sustain process upon libels so conceived, without any special condescendences, but in some particular instances where this very objection has been proponed, to repel the same as irrelevant.

For though, in some particular cases, instances may be found, where the name of a particular person has been mentioned in the
C libel ;

libel; yet even in those, there was always a generality, such as occurs in the present case, and a proof allowed at large, without being confined to the guilt of that particular person condescended upon. And such being the uniform practice, and which, the respondent is informed, may be traced back to the very origin of the commissariat-court, that is sufficient to explain how the law has been understood in matters of this kind. The usage and practice makes law in such cases. The Commissaries have a privative jurisdiction in all such questions; no libel of divorce can be exhibited in any other court; and therefore it is the practice of that court alone that must determine what is the law in this, or such other particular; especially where the practice is founded in the nature of things, and in the principles both of law and justice.

The complainer, after searching for precedents in the records of the commissary-court, has been able to produce but one single instance where such special condescendence was required, *viz.* that of *Dormont*, where the lady having complained to your Lordships, by bill of advocation, of iniquity committed by the Commissaries, in admitting the libel to proof, without a more special condescendence of persons, times, and places, there appears an interlocutor of the Lord *Monzie's*, dated 12th *February* 1741, bearing to proceed upon his Lordship's report; whereby the bill was refused, but remitted with this instruction, *inter alia*, "That before adducing the pursuer's proof, he be ordained to give in a condescendence of the persons with whom, if known to the witnesses; and some marks distinguishing the persons, if unknown to them."

What may have been intended by this injunction, is not an easy matter to say; as it stands conceived, it is stark nonsense, where, before adducing the pursuer's proof, it enjoins a condescendence of the persons, if known to the witnesses; and if unknown to them, some marks of distinction: for how could it appear, whether the persons were known or unknown to the witnesses before they were adduced? He might inquire at the witnesses who the persons were; and if they pleased to inform him, good and well: but he had no compulstion against them to oblige them to speak out before they were brought to give their testimonies.

The law cannot presume the husband's privity or knowledge of the particular persons who were admitted to his wife's embraces. He may have strong suspicions, as the respondent has in this case, who they were, and probable grounds to expect, that, upon examining the witnesses, they will either be named, or so described as

to render it evident and clear, that they were other persons than him; but that the husband, from whom, of all mankind, these criminal practices were chiefly meant to be concealed, should be obliged beforehand to condescend upon the persons, would, in most cases, be requiring an impossibility; and which might be attended with very undesirable consequences, if persons were to be named against whom there might be just cause of suspicion, though the proof, as it comes out, may not be sufficient to fix the guilt upon them. He may be misled of purpose by false information; and, upon proof, it might come out, that these persons are innocent, and others guilty. The most guilty may not only be unsuspected, but not personally known either to him or the witnesses; yet, in all these cases, her guilt and his injury are the same. It is from the examination alone that these and all other proper discoveries are to be expected.

And as the law, in this particular, stands established by uniform and immemorial usage and practice, excepting in the single instance above mentioned, to which no great regard can be paid, for the reasons above assigned; and, in the after proceedings in that very cause, as the lady was pleased to recriminate, alledging her husband to have been guilty of the like adultery, she was admitted to prove his being guilty thereof, not only with the particular woman condescended on by the lady, but with any other woman at the place condescended upon.

The respondent has therefore gone further than he could have been compelled, where, in order to avoid all unnecessary altercation upon this point, he has condescended upon such distinguishing marks of the persons he supposes to be most guilty, as, if proved, clearly demonstrates, that those supposed guilty persons were not the pursuer; which is all that is requisite in law, justice, or common sense, to convict the complainer of this crime.

The fatal consequences that must attend a conviction, will not weigh with your Lordships to deny the respondent that relief which the law justly intitles him to. He is not insensible of the dangerous situation in which this unhappy complainer stands; that, if he is not greatly deceived in the proof he expects, she is upon the verge of a most dreadful precipice; that, if convicted, infamy and want await her as the just punishment of her misconduct. His own misfortunes have not occasioned him more real affliction than her's. He wishes he could cover her from shame as easily as he can protect her from want. She knows he is incapable to leave
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her exposed to the last of these. He has said so to herself, and to her friends, and he now repeats it to the world, That he shall ever consider it to be his duty, not only to preserve her from want, but even to make her life as comfortable as he can; and that as well in respect of the affection he once bore her, as being the mother of a child he acknowledges to be his, as from a regard to some peculiarly unfortunate circumstances that have attended her fate in life from her earliest years.

The *second* article or ground of complaint is, That the Commissaries have reserved the consideration, touching the examination or precognition of witnesses, till such witnesses are adduced, or a list of them given in to process.

She assumes it as the basis of her argument upon this point, That in every cause, civil or criminal, it is competent for the defender, before any proof is allowed, to insist, that the pursuer shall exhibit every writing in his possession, and confess or deny every fact which the defender thinks may be material for his defence to know.

And she says, That in this case it is material for her, not only to know, whether the respondent, in precognoscing the witnesses meant to be adduced against her, did put them upon oath, but also the means and arguments which he used with them to make them discover what they knew of the complainer's guilt.

The respondent, in general, does peremptorily refuse his having used any unlawful means with any person whatsoever, with respect to the subject-matter of this trial, and gives defiance to the complainer, and all her confederates, to prove the contrary; and if he is not deceived, it will appear, when the witnesses come to be examined, that such of them as were suspected to be most capable of bearing testimony against her, have been tampered with in a very unbecoming manner, by some whose interest it is, as well as her's, to prevent a full discovery.

The respondent makes no difficulty to acknowledge, that before he came to any determined resolution to prosecute this divorce, he endeavoured, by all fair means, to discover, from those whom he considered most capable to inform him, the particulars of the complainer's secret practices; that when, by means of these inquiries, he had made some discoveries, of which he had formerly no suspicion, he urged them, by every possible argument, to conceal no part of the truth: and he is humbly of opinion, that his precaution, in this respect, was so far from being criminal or culpable, that he would have been highly to blame, had he neglected every possible

possible means to come at a discovery of the truth, before imbar-
king in a trial of this nature, the consequences of which were of the
last importance to the complainer as well as himself.

And therefore supposing, for argument's sake, that one or more
of those persons, when warmly pressed to declare the truth, had at-
tested the same by an appeal to Almighty God, that what they de-
clared was true, the respondent cannot conceive that there was any
thing immoral or faulty upon his part, in suffering the person thus
freely and voluntarily, by an appeal to God, to attest the truth of
what he so declared.

Was this to be deemed in any respect faulty, which he cannot
conceive it is, it would be chargeable upon the witness only. How
far it would be available, either to reject his testimony entirely, or
to influence his credibility, is not *hujus loci* to dispute. It was pro-
perly reserved to be the subject of after consideration, when any of
the witnesses against whom this objection was supposed to lie, should
be adduced.

It is a false principle assumed by the complainer, That every de-
fender, before entering upon proof, is intitled to demand exhibition
from the pursuer, of all writings in his possession, and consequent-
ly to confess or deny all facts that are put to him, which the de-
fender is pleased to think may be material for his defence.

Thus far he knows, that when a defender is brought upon oath,
for proof of any particular fact, if he suspects his party to be pos-
sessed of any writings relative to the matter to which he is to de-
pose, he may insist for a previous exhibition of these, to prevent
his being led into a snare, if, after he has deposed, writings might
be produced, out of the pursuer's pocket, to prove that he has de-
posed falsely.

He further knows, and admits, that if a party, whether pursuer
or defender, makes any relevant allegation, which he offers to
prove by writings particularly condescended upon, as in the other
party's possession, he may force production of these *in modum pro-*
bationis; or if he avers any facts, as consistent with his party's
knowledge, and affording any relevant defence, he may put it to
his party to confess or deny these, in order to avoid the unnecessary
expence of a proof, in case the facts shall be confessed.

But that it is the privilege of any party, whether pursuer or de-
fender, to call upon the other to confess or deny every fact that he
is pleased to put to him, whether pertinent or impertinent, rele-

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vant or irrelevant, is a proposition manifestly too absurd to be seriously maintained, and warranted by no practice.

The complainer's curiosity prompts her to know beforehand, not only whether any of those that are meant to be adduced as evidence against her, were precognosed upon oath, but also what means and arguments the respondent made use of to induce them to discover what they knew of these matters; and he will venture to say, that the request is quite new and unprecedented, and such as no man can be obliged to answer.

In general, the respondent has denied that he used any unlawful means to prevail with any of the witnesses to communicate to him what knowledge they had of these facts; and that he pressed and exhorted them to say nothing but truth. If the complainer apprehends the contrary, she is at full liberty to prove the same as she best can. That he conversed with many upon the subject, is most certain, and was anxious to draw from them severally what knowledge they had of the particular facts proper or necessary to be proved. He hopes to have no occasion to examine many of the persons at whom this inquiry was made. If any shall be adduced that the complainer shall be of opinion are liable to any objection, then will be the proper time for her to insist, that such persons ought not to be admitted to give evidence. If none such are adduced, the complainer has neither title nor interest to know what conversations passed between the respondent and them; and therefore the Commissaries acted most properly, when they reserved the consideration of this till the witnesses are adduced, or a list of them given in to process, when, and no sooner, the complainer can say whether any of them are exceptionable.

And therefore, to conclude, as the Commissaries have committed no iniquity in either of the above particulars, it is hoped your Lordships will have no difficulty in refusing the bill *simpliciter*.

In respect whereof, &c.

ALEX. LOCKHART.
ALEX. CUNNINGHAME.